BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA DECKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,154
PREMIERE INC.	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an award entered by Assistant Director Brad E. Avery on October 14, 1997. The Appeals Board heard oral argument February 17, 1998.

APPEARANCES

Claimant appeared by her attorney, Joseph R. Ebbert of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, James E. Martin of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Board has also adopted the stipulations listed in the Award.

ISSUES

The parties have stipulated to all elements of the claim except the wage loss factor for work disability. The Assistant Director found a 50 percent wage loss during the period after the accident when claimant worked half-time for respondent. The Assistant Director found the wage factor should be changed to 100 percent once claimant left employment for respondent and no longer earned a wage. On appeal, respondent contends claimant should be limited to functional impairment of 17.6 percent to the whole body because, according to respondent, claimant failed to make a good faith effort to find employment.

Respondent relies on Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. Claimant is awarded benefits for a single work disability rate of 43.5 percent.

Findings of Fact

1. Claimant injured her low back on January 24, 1994, while lifting a box of plastic strips. The injury, as stipulated by the parties, arose out of and in the course of her employment with respondent.

2. Respondent provided treatment, in part, by Robert M. Drisko II, M.D. Dr. Drisko diagnosed a large herniated disc at L5, S1 with lateral recessed stenosis at this level and the level above. On July 15, 1994, claimant underwent a spinal decompression laminotomy at L4-5 and L5-S1, bilateral foraminotomies at L4-5 and L5-S1, as well as diskectomy at L5-S1.

3. David K. Ebelke, M.D., evaluated claimant post-operatively because of continued complaints involving the low back and lower extremity. At Dr. Ebelke's direction, claimant received additional epidural injections and underwent additional diagnostic studies. Dr. Ebelke ultimately released claimant from his care but concluded claimant was not capable of lifting more than 25 pounds on an occasional basis and recommended claimant avoid repetitive bending, stooping, and twisting.

4. Claimant returned to work for respondent, working only four hours per day, during the time she was seeing Dr. Ebelke. Dr. Ebelke, in his report dated March 17, 1995, thought claimant probably would be able to work eight hours per day but suggested this should be her personal decision:

> I think she should probably be gradually advanced on the number of hours she works, and over the next 1-2 months be gradually progressed to eight hours per day if tolerable. Ultimately, she may feel she can't work eight hours per day because of her pain, but I think this has to be her personal decision, and I am not going to try to place any hourly limits on her.

5. Claimant was evaluated by Michael J. Poppa, D.O., on June 8, 1995. Dr. Poppa recommended claimant not lift more than 25 pounds from knuckle to shoulder on an occasional basis, avoid pushing greater than 39 pounds on an occasional basis, avoid pulling more than 31 pounds on an occasional basis, and avoid repetitive waist bending, crawling, kneeling, or stooping. Dr. Poppa stated in his report that it was reasonable to

assume claimant would be able to work up to eight hours per day by adding one hour per day for each week she worked.

6. After her injury, claimant returned to work for respondent and worked four hours per day from November 1, 1994, through August 31, 1995, when she was laid off. Claimant testified that working four hours per day caused a lot of back pain and she was not able to increase her hours. Because she worked only four hours per day, claimant earned an average weekly wage which was 50 percent of her pre-injury wage.

7. After being laid off by respondent, however, claimant contacted and/or applied for employment with several employers. Claimant limited her search because she was not willing to work evenings, was not willing to work weekends, and, although a resident of Eudora, not willing to work in the nearby city of Lenexa because of the traffic.

8. Respondent retained the services of Richard W. Santner, M.S., to assist claimant in finding work. He noted the limits claimant placed on efforts to find work. In addition to not being willing to work evenings or weekends, claimant advised that some of the jobs were not interesting enough. Although he was not successful in finding employment acceptable to claimant, he believed she is employable in the Lawrence/Eudora area in jobs paying $5.00 to $5.75 per hour in jobs which at least start out at 20 hours per week. Claimant described her job as a 20-hour per week job which allowed her to alternate sitting, standing, walking, and required no lifting over 10 pounds.

9. The Board finds claimant's efforts to find employment do not satisfy the good faith effort requirement imposed by our Act as it has been construed in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

10. The Board finds claimant would be able to earn $5.50 per hour working 20 hours per week for an average weekly wage of $110 or 58 percent less than the $260.46 stipulated to be the average weekly wage she was earning at the time of her injury.

Conclusions of Law

1. K.S.A. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. K.S.A. 44-510e(a) also provides that a claimant will not be entitled to receive a disability higher than the functional impairment so long as the claimant earns a wage which is 90 percent or more of the pre-injury average weekly wage.

3. Copeland, *supra*, provides that an employee will not be entitled to compute work disability using the actual percentage difference between the pre- and post-injury wage unless the employee makes a good faith effort to find employment. Copeland does not stand for the proposition that the disability should be limited to functional impairment in every case where the claimant did not make a good faith effort to find employment. A wage will be attributed to such a claimant based on relevant factors, including expert testimony about the wage the claimant is able to earn. The result limits claimant to functional impairment only if that attributed wage is 90 percent or more of the pre-injury wage. K.S.A. 44-510e.

4. The Board finds a wage of $5.50 per hour should be attributed to claimant based on 20 hours per week. The attributed wage yields a 58 percent wage loss to be used to determine the extent of work disability.

5. Claimant has a 43.5 percent work disability based on a 58 percent wage loss and the 29 percent task loss stipulated to by the parties.

6. Claimant would be entitled to a 39.5 percent work disability during the period she worked for respondent after the injury, a period of approximately 10 months or 43 weeks. Her wage loss at that time was 50 percent and this wage loss averaged with the 29 percent task loss gives a 39.5 percent work disability. But the approximately 43 weeks of payments made under the 39.5 percent work disability would be credited against the payments made under the higher 43.5 percent work disability applicable once claimant was laid off. The total benefits to the claimant would be the same. In either case, the total payments to claimant for permanent partial disability would be 166 weeks at $173.65 per week. Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, ___ P.2d ___ (1997).

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Assistant Director Brad E. Avery, dated October 14, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Barbara Decker, and against the respondent, Premiere, Inc., and its insurance carrier, St. Paul Fire & Marine Insurance Company, for an accidental injury which occurred January 24, 1994, and based upon an average weekly wage of $260.46 for 40.14 weeks of temporary total disability compensation at the rate of $173.65 per week or $6,970.31, followed by 8.25 weeks of temporary partial disability compensation at the rate of $173.65 per week or

$1,432.61, and 166 weeks at $173.65 per week or $28,825.90, for a 43.5% permanent partial work disability, making a total award of $37,228.82, all of which is presently due and owing and should be paid in one lump sum less amounts previously paid.

The Appeals Board approves and adopts all other orders entered in the Award.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph R. Ebbert, Kansas City, KS
James E. Martin, Overland Park, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director